88-253

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

DENZIL PRITCHARD, et ux.

Appellants

v.

BOARD OF COMMISSIONERS OF CALVERT COUNTY, et al.

Appellees

STATEMENT OF JURISDICTION FOR APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Whether the Calvert County Zoning Ordinance denied your Appellants due process of law by taking from them a property right without notice and an opportunity to be heard.

2. Whether the Calvert County Zoning Ordinace denies your Appellants equal protection of the law by creating a procedural system which classifies claimants with equally meritorious claims into disparate classes on the basis of the State's ability to act on the claim.

LIST OF PARTIES

1. Denzil Pritchard
2. Elizabeth Pritchard
3. Board of Commissioners of Calvert County
4. Planning Commission of Calvert County

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REFERENCES TO OPINIONS BELOW

The decision of the Court of Appeals of Maryland, Board of Commissioners of Calvert County, et al. v. Denzil Pritchard, et ux., filed May 9, 1988 is reported at ___ Md. ___, 540 A.2d 1139 (1988). A copy of that Opinion is attached hereto as Appendix "A".

The Opinion of the Court of Special Appeals of Maryland, Denzil Pritchard, et ux v. Board of Commissioners of Calvert County, et al., Case No. 1435, September, 1986, was filed June 26, 1987 but was not reported. A copy of that decision is attached hereto as Appendix "B".

Notices of Appeal have been

filed on August 5, 1988 with the Court of Appeals of Maryland and the Circuit Court for Calvert County. Copies of those Notices of Appeal are attached hereto as Appendix "C".

JURISDICTION

The jurisdiction of this Court to hear this Appeal is conferred by 28 U.S.C., Section 1257 (2). Jurisdiction is based upon the fact that the Appellants challenged a state statute on the ground that it was repugnant to the Constitution of the United States. The highest Court of the State, the Court of Appeals of Maryland, decided the issues raised by the Appellants in

favor of the validity of the statute.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this proceeding, the Fourteenth Amendment, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". **U.S. Const.** amend. XIV, Section 1.

The statute involved in this

suit, provides in relevant part:

> "B. Undeveloped Rural Commercial properties outside Town Centers as identified on the Zoning Maps will be allowed to retain commercial zoning for a period of two years from the adoption of this Ordinance. At that time, those properties with an approved site plan will have an additional two years to complete substantial construction of their buildings. Those properties without an approved site plan shall be automatically zoned consistent with the zoning in the area after the first two year period. Those properties with approved site plans which have not completed substantial constructuion of their principal buildings within the additional two year period referred to above, shall be automatically zoned consistent with the zoning in the area. Only those portions of properties which can demonstrate substantial construction of their principal buildings within the additional two year period shall retain commercial zoning. Any residue

shall be zoned consistent with the zoning in the area". Calvert County Zoning Ordinance, Section 7-4.02B (1984).

STATEMENT OF THE CASE

Denzil and Elizabeth Pritchard are the owners of a parcel of land situated at the intersection of Maryland Route 4 and Brickhouse Road in northern Calvert County, Maryland. In 1985, the Pritchards entered into a contract with Compson Development, Inc. whereby Compson would purchase the property and develop it as a shopping center. At that time, the property was zoned rural-commercial, which designation allowed for retail development of

more than five thousand (5,000) square feet. Further, the property was marked with a star on the official zoning map of Calvert County. That "star" designation refers to Section 7-4.02 B of the Calvert County zoning ordinance set out above. Under that Ordinance, the Pritchard property would be automatically reclassified on May 8, 1986. That property had for approximately eighteen (18) years prior to May 8, 1984 an unqualified commercial zoning.

Compson submitted a site plan which was subsequently modified and submitted as a sketch plan. Both were denied approval by Calvert

County. Compson did not appeal those decisions. For reasons not relevant to this Appeal, the Pritchards did not appeal the denial of the Compson plan. However, the Pritchards filed a second site plan in their own name identical to the one originally proposed by Compson on May 7, 1986 (prior to the expiration of the first two year period).

On or about May 21, 1986, the Planning Commission held a hearing and denied site plan approval on the ground that the site plan was "not consistent with proper zoning". The Pritchards received no notice of this hearing until some time after

May 27, 1986. No hearing was held on the issue of what zoning designation was then applicable to the Pritchard property. The Pritchards were afforded no opportunity to appear before the Commission or the County agencies.

The decision of the Planning Commission was appealed to the Circuit Court for Calvert County.[1] There, the Pritchards raised four grounds in challenging the decision of the Planning Commission. First; the Pritchards urged at some

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[1] In Maryland, the Circuit Courts serve as appellate courts from decisions of administrative agencies.

unidentified point during the two year period grace period guaranteed in the ordinance, that they had been denied due process in that their existing property right in the existing zoning classification had been taken from them without notice or an opportunity to be heard. Second; that the ordinance denied them equal protection in that it allowed the County to classify similar claimants into disparate classes on the basis of the County's ability and willingness to act within the first two year period. Third; that the ordinance violated the State's enabling statute. Fourth; that an interpretation of

the statute which allowed for consideration of the site plan after the May 8th deadline would further the legislative intent. Former Judge Perry G. Bowen of the Circuit Court rejected these arguments and affirmed the decision of the Planning Commission.

The Pritchards appealed the Circuit Court's decision to the Court of Special Appeals, Maryland's intermediate appellate court, in Denzil Pritchard, et ux. v. Board of Commissioners of Calvert County, et al., (unreported, No. 1435, September Term, 1986, filed June 26, 1987). The Court of Special Appeals recognized the inherent flaw in the

statute in that the Pritchards did not control the approval process. The Commission was required to act on the application, but there was no time frame set forth in the statute in which this must be done. If the Commission or the agencies chose not to act, the Pritchards' entitlement was lost without the benefit of a hearing. Therefore, the Court of Special Appeals held, the ordinance violated the Pritchards' right to due process.

The County sought and was granted a Writ of Certiorari to the Court of Appeals, Maryland's highest Court. In Board of Commissioners of Calvert County, Maryland, et al. v.

Denzil Pritchard, et ux., ___Md.___, 540 A.2d 1139 (1988), the Court of Appeals reversed the decision of the Court of Special Appeals holding that there had been no denial of due process, or denial of equal protection under the ordinance.

As The Pritchards have drawn into question the validity of a state statute on the ground that it is repugnant to the Constitution and the highest Court of the State has found in favor of its validity, notices of appeal were filed to this Court.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Over the past decade, the

question of what process is due when the state seeks to extinguish a property right has been before this Court on numerous occasions. This case once more raises those issues, but in a context which this Court has not addressed. First, whether there can be a property right in a zoning classification. Second, if there is such a property right, whether the landowner is entitled to procedural due process and equal protection before that property right can be taken.

The Appellants have relied principally on the case of Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982). In that case, the

Appellant's claim was denied because the Illinois Fair Employment Practices Commission failed to hold a hearing as required by the statute within one hundred and twenty (120) days of the date of the filing of the complaint. This Court held that to deny a hearing under those circumstances deprived Logan of his right to bring his discrimination claim without due process of law. In addition, six Justices of this Court in concurrences opined that the scheme established by the hundred and twenty (120) day rule, which extinguished meritorious claims at the sole whim of the state, created an illegal

classification that was arbitrary and capricious under the equal protection clause. The Calvert County zoning ordinance at issue in this case also denies the Appellants due process of law and classifies applicants on an arbitrary basis.

The Pritchards owned real property in Calvert County, Maryland. That property was designated rural-commercial, which designation allowed them two years after the zoning reclassification to have a site plan approved for the property. A site plan was submitted for the property by Compson (the contract purchaser) but was denied by the Planning Commission. On the

eve of the two year deadline, the Pritchards submitted a second site plan. The Planning Commission did not act on that site plan until after the two year deadline and, following a hearing of which the Pritchards had no notice, denied approval of the site plan on the basis that the property had reverted to rural zoning (the two year grace period having expired prior to the County's actions). The Appellants have argued that the fatal flaw in this zoning classification is that it purported to give the Pritchards an absolute right, within two years, to obtain an approved site plan, although there was no way to

force the County to act within that two year period to approve the site plan. In fact, it was quite possible, if not probable, that a site plan submitted on the first day under the classification would not have emerged from the appeal process of the Maryland courts until after the two years had expired. The Pritchards contend and the Court of Special Appeals found that said statute denied the Pritchards due process. Their right in the zoning classification was taken at some indefinite point when it became impossible for the County to act upon the application and allow the Pritchards sufficient time for that

action to be reviewed. Moreover, they were denied due process when their property was "reverted" to rural zoning without a hearing to determine if that was the correct designation. The ordinance also violates the equal protection clause. The County ordinance arbitrarily divided applicants into those who received consideration of their site plan and those who did not on the basis of the County's willingness and ability to act within the two year period. The County could arbitrarily fail to act, or place procedural barriers before a meritoriously submitted site plan, and thus avoid the

necessity for a hearing within the two year period.

The Appellants had a property right in the zoning classification. This Court has yet to consider whether there can be a property right in a zoning classification. A property right arises when there is an interest which cannot be taken away except "for cause". The rural-commercial zoning classification under this statute could not have been taken except "for cause". The zoning was guaranteed by the very language of the statute for two years. Therefore, in order to have constitutionally changed the designation during that period, one

of two routes should have been followed. First, the Board of Commissioners could have re-zoned the County by the legislative process. Second, the County could have applied for a reclassification of the Pritchard property under Maryland's change/mistake rule. [2] However, such a reclassification would have required a quasi-judicial hearing. Therefore, at least for the two year period created by the statute, the zoning

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[2] The change/mistake rule provides that property may be reclassified if the applicant can show a substantial change in the neighborhood or a mistake in the original zoning. Cardon Investment v. Town of New Market, 302 Md. 77 (1984).

classification had the hallmarks of a property right. Once the site plan was approved, the property was statutorily guaranteed an additional two years to substantially complete the project. So that the property right was actually a four year period granted to develop property.

A holding that there can be a property right in a zoning classification would be of substantial importance. A number of jurisdictions have adopted "use it or lose it" zoning ordinances. These ordinances generally provide that for a specified period of time, zoning for property will be some

stated classification. The Appellants contend that when a classification is guaranteed for a specific time, that classification must be valid for that entire time. During that period, there is a property right which can only be extinguished for cause with attendant due process of law; either quasi-judicial, judicial or legislative.

In its opinion, the Court of Appeals of Maryland blurred the distinction between a property right and a vested property right and as a result erred in its decision. Under Maryland law, once certain construction has been done on

property, the property owner has a "vested" property right. Rockville Fuel and Feed Co. v. City of Gaithersburg, 266 Md. 117 (1972). A "vested" property right cannot be changed by subsequent legislative enactments. The Pritchards did not have a vested property right. The County could have reclassified the property by legislative enactment. But, the Pritchards did have a property right subject to legislative enactment and subject to the change/mistake rule. Their zoning by the express language of the statute was guaranteed for two

years. [3]

Given that guarantee, the issue then becomes what process was due the Pritchards prior to the extinguishment of the right. At a minimum, they must be afforded notice and an opportunity to be heard. But, no such process was afforded the Appellants. At some point during the two year period, the Appellants were stripped of their property right. Given the amount of time it would take to submit a site plan, and if denied,

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[3] Also, it would appear axiomatic that in order to "vest" a property right, there must initially be some property right which can "vest".

appeal that denial to the Circuit Court, the Court of Special Appeals, and the Court of Appeals, it is likely that a site plan submitted on the first day of the two year period would still not be approved. The Appellants cannot know when they had rural-commercial zoning and when they did not have rural-commercial zoning. Although the guaranteed two year period did not expire until May 8, 1986, Appellants did not have rural-commercial zonong on May 7, 1986. In all likelihood, they did not have rural-commercial zoning on April 7, 1986, March 7, 1986 or February 7, 1986. When their property right was taken is

impossible to ascertain. But, the zoning classification was extinguished at some point without any notice or opportunity to be heard.

Further, the Appellants were never offered an opportunity to demonstrate that their property had rural-commercial zoning after the May 8th deadline. Site plan approval was summarily denied on the basis that the property was zoned rural. Someone in the Planning Commission arbitrarily decided that this property should be zoned rural. However, the ordinance provides that the property is to be zoned consistent with the surrounding area

although it does not define area. Part of the surrounding area, as noted by the Court of Appeals in Footnote 2 of its opinion, had an approved site plan. Therefore, that portion would have continued its rural-commercial zoning. It should have been considered in determining the property's designation. However, since there was no hearing, there was no basis for the reclassification.

Twice, the Pritchards were denied due process. First, when their right to rural-commercial zoning was taken at some indefinite point during the two year period rendering the two year guarantee an

illusion. The Pritchards were compelled to force the Planning Commissioner, the Circuit Court, the Court of Special Appeals and the Court of Appeals of Maryland all to act within two years in order to maintain their zoning. That is an intolerable burden. Second, tneir property right was extinguished when their land was reclassified with no hearing as to what constituted the surrounding area.

A property owner who has a property right in a zoning classification cannot be denied that right on the basis that it is impossible to force the County to act within the time limits placed

upon the property owner. Many counties now have "use it or lose it" provisions. When these "use it or lose it" provisions provide a set time to develop the property, but make the ability to develop that property subject to the whim of the County, then these "use it or lose it" provisions deny the landowner due process of law. Moreover, when an ordinance provides that a zoning classification will change to some other unspecified classification, the ordinance must provide for a hearing to determine what the classification of the property will be.

This ordinance as written also

violates the equal protection clause. Absent some special right, equal protection only requires that a classification not be arbitrary or capricious; but, this is not a toothless standard. In Logan, this Court addressed the equal protection problem inherent in the Illinois statute. This ordinance is also inherently flawed. It creates two classes of applicants for site plan approval. Those applicants who submitted a site plan which the County chose to act upon within two years received a full hearing and those applicants who submitted a site plan which the County chose not to act upon within the two years

were denied any hearing. This is an arbitrary and irrational classification. A classification cannot be based upon the County's own actions or inactions with no standard therefore. The applicant cannot have the onus of forcing the County to act.

It is inconsequential under this analysis that the Pritchards submitted their site plan on the last available day under the ordinance. Had they submitted their site plan weeks, or even months earlier, they could well be in the same position today. To extinguish the property right and render meritless the Pritchards'

application, the County needed only to wait until after May 8th to consider the application regardless of when the application was filed. A state should not be allowed the power to destroy a right it has created at its sole whim merely by declining to act.

CONCLUSION

This Court should hear argument to determine fully the issues in this case. First, whether there can be a property right in a zoning classification which is entitled to equal protection and due process has implications beyond this case and would reach an issue that naturally

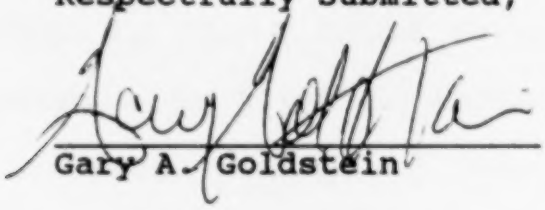
flows from the Court's property rights cases. Zoning effects nearly every landowner in this nation. If there is no property right in a zoning classification, then administrative agencies can change these classifications at their whim, without any standard or accountability. If there is no property right, then these classifications are illusory, and zoning decisions may be made on an ad hoc basis. The purpose of zoning, to allow for future planning, is stripped away as the designations are subject to change without notice or cause. This Court may take judicial notice of the

increasing use by municipalities of "zoning statutes" to effect a de facto takings of property for the benefit of the municipality without the attendant expense of a condemnation proceeding. However subtly a municipality achieves that purpose, it is nevertheless a substantial violation of a citizen's fundamental constitutional rights and must be carefully scrutinized and narrowly defined.

Second, Logan and its progeny indicate that some process, either legislative or judicial, is due a landowner before a zoning classification can be stripped away. Finally, a County should not be

allowed to divide claimants into disparate classes based upon its own actions. As such, this case raises issues beyond the private interests of the parties. It would allow this Court to expand upon its holdings in Logan and would continue to define the power of a state to link a person's rights to the state's processes.

Respectfully Submitted,



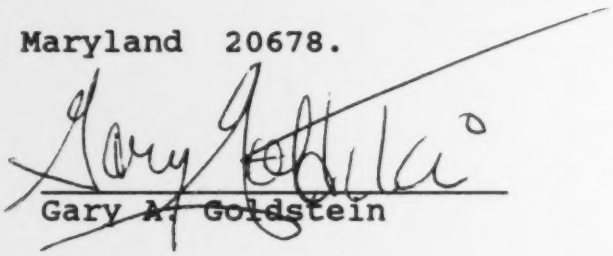
Gary A. Goldstein

Charles E. Haller

CERTIFICATE OF SERVICE

I, Gary A. Goldstein, hereby certify that as a duly admitted member of the Bar of the Supreme Court of the United States that on this 8TH day of August, 1988, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I did serve three (3) copies of this Statement of Jurisdiction by first class mail, postage prepaid on Allen S. Handen and Mary M. Krug, Handen and Krug, P.O. Box 1130, Prince Frederick, Maryland 20678, attorneys of record for the Board of Commissioners of Calvert County and the Planning Commission of Calvert County; on

William Bowen, President of the Board of Commissioners of Calvert County, Court House, Prince Frederick, Maryland 20678; and on MacArthur Jones, Chairman of the Planning Commission of Calvert County, Court House, Prince Frederick, Maryland 20678.



Gary A. Goldstein

With the permission of the Clerk of the Court, the Appendixes hereto are being submitted under separate cover. Said Appendixes will be filed subsequent to the filing of this Statement of Jurisdiction.